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No. 82-1948

In The

Supreme Court of the United States

October Term, 1982

ED CANTRELL,

Petitioner,

vs.

REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

BRIEF IN OPPOSITION

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PREFACE

The issues decided by the United States Court of Appeals for the Tenth Circuit, and which the plaintiff seeks to have reviewed by this Court were before the Circuit Court pursuant to the provisions of Rule 54(b), Federal Rules of Civil Procedure[1] and pursuant to the provisions of 28 U.S.C. § 1292(b).[2] Both the petitioner and the respondent made interlocutory appeals for the purposes of having the Court of Appeals consider certain important issues of law before the case proceeded on the merits. Today, the case still is stayed, and no proceeding on the merits have occurred.

It is important also that the trial court, even though it had dismissed Count I of the complaint against the petitioner, which was a wrongful death claim brought under the diversity jurisdiction of the court, denied the motion to dismiss the second count, which was a civil rights claim, which had been brought under the federal question jurisdiction of the court. That finding by the trial court was affirmed by the Court of Appeals. Thus, even if the Court of Appeals had affirmed the dismissal of Count I, the petitioner was still obligated to respond to the second claim.

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[1]App., 1
[2]App., 2

ARGUMENT

There are compelling reasons why the court should deny the Petition for a Writ of Certiorari. First, none of the issues which the petitioner seeks to have reviewed fall within the parameters of Rule 17, Revised Rules of the Supreme Court of the United States,[3] or within the teachings of the opinions of this court. Secondly, the Court of Appeals did not abuse its discretion in reversing the trial court's order dismissing the wrongful death claim. Lastly, the matters sought to be reviewed were before the Circuit Court on interlocutory appeal.

I. There are no special or important reasons presented which merit granting the Writ of Certiorari.

The decision of the Court of Appeals which the petitioner seeks to have reviewed is not one which is in conflict with the decisions of any other courts of appeal. Neither is the decision in conflict with any opinion of the Supreme Court of Wyoming where matters of state law are involved, nor is the decision in conflict with any of the decisions of this court.[4]

While the issues the petitioner raises have importance for the parties, they do not involve questions of gravity and general importance for the public. Under such circumstances, this court has refused to grant certiorari.[5] When this fact is coupled with the fact the petitioner has failed to show the existence of any conflict between the decision it seeks to have reviewed and the decisions of the Wyoming Supreme Court or

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[3]App., 3
[4]Rule 17, Revised Rules of the Supreme Court of the United States
[5]NLRB v. Pittsburg S.S. Co., 340 U.S. 498 (1951)

of any other federal courts, an additional reason exists for denying the petition.[6]

The petitioner has argued that two important federal questions exist which should be addressed. One is the extent to which a state statutory limitation scheme must be adopted for actions brought under 42 U.S.C. 1983. The other issue of importance, the petitioner contends, is whether the plaintiff has a valid claim under 42 U.S.C. § 1983. While these two arguments may have apparent academic appeal, they are not issues which have posed problems for either the federal trial courts or the federal courts of appeal. Both levels of court have held federal rules of procedure, not state rules, determine when an action brought under 42 U.S.C. § 1983 is deemed to have commenced.[7]

Similarly, both the trial courts and the courts of appeal have recognized that a person in the respondent's position may assert a valid claim under 42 U.S.C. § 1983.[8] The case law is clear that a § 1983 action may be stated by relying upon a state's wrongful death statute.[9]

Neither has the petitioner shown in its petition the existence of any conflict among the lower courts on either of these two issues. Nor has the petitioner cited any authority which supports its contention that 42 U.S.C. § 1988 requires the adoption of a state procedural scheme concerning the

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[6]Fields v. United States, 205 U.S. 292 (1907)

[7]Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947), cert. denied, 332 U.S. 825, reh. denied, 332 U.S. 845 (1947); United States v. Malkin, 317 F.Supp. 613 (E.D.N.Y. 1970)

[8]Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), cert. denied, 386 U.S. 921 (1961); Baffa v. Black, 481 F.Supp. 1083 (E.D. Pa. 1979)

[9]Galindo v. Brownell, 255 F.Supp. 930 (S.D. Cal. 1966); Smith v. Wickline, 396 F.Supp. 555 (W. D. Okla. 1975)

commencement of an action which is brought under the federal question jurisdiction of the court. Properly, these matters should first be dealt with at the trial court and appellate court level. They are not of such importance that this court should review the matters at this time. While the two issues are, perhaps, of academic or episodic interest, they are not sufficient to support a granting of a writ of certiorari.[10]

II. There has been no abuse of appellate powers.

The real thrust of the petitioner's argument in support of the granting of a writ of certiorari is that the appellate court abused its discretion in reversing the trial court's ruling which had dismissed the respondent's wrongful death claim. The petitioner contends that the court of appeals made findings unsupported by the record and contrary to the findings of the district court on issues not raised by the parties. This simply is not so.

The circuit court stated three distinct and cogent reasons for reversing the trial court as to its legal conclusion for dismissing the wrongful death claim of the respondent's complaint. The trial court had held that, as a matter of law, there had been no service upon the petitioner so that the court failed to acquire jurisdiction before the statute of limitations ran. Considering the same facts which were before the trial court, either by way of the pleadings or by way of affidavits, the circuit court simply reached a different legal conclusion. The circuit court is not required to give any specific weight to the trial court's conclusions of law. Rather, it is the appellate court's duty to determine if the correct rule of law has been applied to the facts as found.[11] Simply, the appellate

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[10]Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)
[11]Campana Corp v. Harrison, 114 F.2d 400 (7th Cir. 1940)

court reached different legal conclusions when it applied to the facts the same body of Wyoming law which the trial court had considered.

The appellate court concluded, first, that the service made on the petitioner was effective. That was a legal conclusion, not a factual finding. Secondly, the appellate court found that the facts and circumstances were such to permit Wyoming's Tolling Statute,[12] to come into play. Whether the tolling statute should apply is also a legal conclusion and a conclusion which the appellate court is entitled to make under the rules.[13] Finally, the appellate court also concluded as a matter of law that the Wyoming Savings Statute[14] applied and relied upon Wyoming case law to support its legal conclusion.[15]

The Court of Appeals has concluded that the trial court improperly applied state law. The petitioner contends that the trial court did not, and that the court of appeals erred in reversing the trial court. This question is simply not of the gravity and importance that it requires review by the Supreme Court of those conclusions of the Circuit Court of Appeals.[16]

Most importantly, the court should deny the petition for a writ of certiorari because the petition seeks a review of the decree of the Court of Appeals on appeal from an interlocutory order.[17] Since both the trial court and the appellate court agreed that the plaintiff had stated a claim against the

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[12]Wyo. Stat. § 1-3-116
[13]Rule 52(b), Federal Rules of Civil Procedure
[14]Wyo. Stat. § 1-3-118
[15]Clause v. Columbia Savings and Loan Assoc., 16 Wyo. 450, 95 P. 54 (1908)
[16]Re Woods, 143 U.S. 202 (1892)
[17]American Const. Co. v. Jacksonville T & KWR, Co., 148 U.S. 372 (1893)

defendant under 42 U.S.C. § 1983, the petitioner was still required to respond to the complaint. Thus, there certainly does not exist, and the petitioner has failed to show the existence, of the necessity to grant the petition for certiorari in order to prevent extraordinary inconvenience or embarrassment in the conduct of the case.[18]

[18]American Const. Co. v. Jacksonville T & KWR Co., *supra*

CONCLUSION

The petitioner has failed to show that the issues it seeks to have reviewed satisfy the requirements both of Rule 17, Revised Rules of the Supreme Court of the United States and of the opinions of this court. Although the issues raised have importance to the parties, particularly to the petitioner, they do not involve matters of broad public interest. More importantly, the court of appeals has not departed so far from the accepted and usual course of judicial proceedings, despite the petitioner's argument, which would require this court to exercise its power of supervision. The court of appeals has simply reached a conclusion of law on one point which differs from the conclusion reached by the trial court. Most importantly, the decree of the court of appeals which the petitioner seeks to have reviewed is a decree arising out of an interlocutory appeal. This fact, when considered with all of the other arguments raised by the respondent requires that the petition be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, George A. Zunker, the attorney for Respondent herein, hereby certify that on the 19th day of August, 1983, I served copies of the foregoing Brief in Opposition on the parties hereto as follows:

1. On Petitioner, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to Mr. Eugene S. Hames, Wood, Ris & Hames, P.C., 1100 Denver Club Building, 518 Seventeenth Street, Denver, Colorado 80202.

2. On respondents Callas, Bider and the City of Rock Springs, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to Glenn Parker, Hirst & Applegate, Boyd Building, Cheyenne, Wyoming 82001.

/s/GEORGE A. ZUNKER
ATTORNEY FOR RESPONDENT
ROSA

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

The foregoing Certificate of Service was acknowledged to before me by GEORGE A. ZUNKER this 19th day of August, 1983.

Witness my hand and official seal.

/s/KELLIE A. ERICKSON
NOTARY PUBLIC

My Commission Expires: September 11, 1983

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.